

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
FEBRUARY 1999 SESSION

FILED

October 22, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, * C.C.A. No. 01C01-9807-CC-00292
Appellee, * Williamson County
VS. * Honorable Donald P. Harris, Judge
JEFFREY W. OSBORNE, * (Possession of Drugs)
Appellant. *

FOR THE APPELLANT:

TRIPPE STEVEN FRIED
302 Third Avenue South
Franklin, TN 37064

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General and Reporter

KIM R. HELPER
Assistant Attorney General
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243

RONALD L. DAVIS
District Attorney General

SHARON E. TYLER
and
JEFFREY PRESTON BURKS
Assistant District Attorney General
P. O. Box 937
Franklin, TN 37065-0937

OPINION FILED: _____

AFFIRMED

JOHN EVERETT WILLIAMS,

Judge

OPINION

The defendant, Jeffrey W. Osborne, appeals from his conviction by a Williamson County jury for Possession of Drugs in a Penal Institution, a Class C felony. The Williamson County Circuit Court sentenced the defendant as a Range III persistent offender to eleven years in the Department of Correction, to be served concurrently with a prior unrelated sentence. The defendant asserts that:

- (1) The evidence was insufficient to support the verdict;
- (2) the trial court erroneously denied his motion for severance;
- (3) the trial court erroneously denied his motion to continue; and
- (4) the trial court erroneously denied his motion for judgment of acquittal and incorrectly charged the jury when the sheriff did not testify as to lack of consent to possess contraband in jail.

We AFFIRM the trial court's judgment.

BACKGROUND

On February 22, 1997, the defendant, an inmate at the Williamson County Jail, and three other inmates were involved in a transaction which included the transfer and attempted "cover-up" of contraband. Correctional Officer Dale Carter testified that from a tower overlooking the jail pods¹ he observed the defendant drop a white article and kick it under a door that divided two pods. He said he saw co-defendant Brandy Morse pick up the object. He said he then saw Officer Hartley, who had also witnessed the transaction, enter the holding area to investigate. Morse ran into a pod on Hartley's approach. Carter then described what might pass for a game of "hot potato": Morse handed the object to co-defendant Timothy Roberts, who passed it to co-defendant Orbin Jones behind Jones's back, who then threw the article toward Morse. The article landed on the floor, and Hartley, after a struggle with Morse, recovered five hand-rolled cigarettes wrapped in tissue paper. The Tennessee Bureau of Investigation

¹ This term describes a common holding area, in which inmates mingle, at the facility.

laboratory confirmed that the cigarettes contained a Schedule VI controlled substance, marijuana.

Williamson County Sheriff's Office Captain George Robinson testified that, as Jail Administrator, on February 22, 1997, he had issued none of the co-defendants permission to possess controlled substances.

The defendant filed a motion for continuance and a supporting affidavit on February 20, 1998. The documents asserted that the defendant "anticipated, on information and belief" that Randall Reed, an inmate at the jail on February 22, 1997, would "be able to testify based on his own observations that the defendant did not possess marijuana while in the Williamson County Jail." The counsel attested that he obtained a subpoena for Reed and twice verified that Reed would be transported to court for the trial. Counsel further attested that on February 19, 1998, he learned that Reed had been transferred to face charges in South Carolina. The trial court denied the motion.

After the trial, Reed executed an affidavit, attesting that he was willing to testify that the defendant placed two Marlboro cigarettes in tissue paper and slid them under the door separating the pods. Reed also testified at the defendant's hearing on a motion for a new trial. The trial court denied this motion.

On October 27, 1997, the defendant filed a motion to sever his case from his co-defendants, on the basis of undue prejudice. On January 21, 1998, the defendant filed a second motion to sever, alleging that at least one co-defendant might testify on his behalf if the trial court granted the motion. On February 17, 1998, the defendant again asserted this issue in another motion for severance. In support of this motion, the defendant's counsel executed an affidavit. Counsel attested that co-defendant Morse "indicated that he [was] willing to testify that

Mr. Osborne kicked two Marlboro cigarettes under the door to [Morse]" and that the cigarettes did not contain marijuana. Counsel further attested that Morse might be unavailable for testimony at a joint trial, because he might invoke his Fifth Amendment rights. At the trial, however, counsel for the defendant admitted to never actually speaking with Morse. The trial court denied all the motions to sever.

After the trial, Morse executed an affidavit, attesting that Osborne sold Marlboro cigarettes, not marijuana, and that his counsel had advised him not to testify at a joint trial.

ANALYSIS

Sufficiency of Evidence

The defendant submits that the evidence was insufficient as a matter of law to sustain his conviction. When an appellant challenges the sufficiency of the evidence, this Court must determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). On a defendant's appeal, this Court grants the state the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. See State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The credibility of witnesses, the weight of their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the trier of fact. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); see also State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). A jury verdict for the state accredits the testimony of the state's witnesses and resolves all conflicts in

favor of the state. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). A guilty verdict also replaces the defendant's presumption of innocence with a presumption of guilt. See State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). A defendant challenging the sufficiency of the evidence carries the burden of illustrating why the evidence insufficiently supports the verdict. See State v. Freeman, 943 S.W.2d 25, 29 (Tenn. Crim. App. 1996).

Under this standard, we find no basis for remand. The officers' testimony established that, except for a brief moment when one co-defendant passed the item behind another's back, at least one officer viewed the item for the duration of the incident.

Motion for Severance

The defendant asserts that the trial court erroneously denied his motion to sever based on unavailability of a co-defendant to testify on his behalf. The state may legitimately expect to try several persons charged with one offense at one trial, see State v. Wiseman, 643 S.W.2d 354, 363 (Tenn. Crim. App. 1982), unless severance is deemed appropriate to "promote a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2). "A motion for severance is addressed to the sound discretion of the trial judge, and the denial of such a motion will not be reversed on appeal unless it appears that the defendant was prejudiced by the court's action." Wiseman, 643 S.W.2d at 362. This Court shall not disturb the trial court's exercise of discretion in these matters absent a clear abuse of discretion. See State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988). "The test for determining whether a trial court has abused its discretion in denying a severance is whether or not the defendant was clearly prejudiced in his defense by being jointly tried with his co-defendants." Id. "The record must demonstrate that the defendant was clearly prejudiced to the point that the trial court's discretion ended and the granting of

[a] severance became a judicial duty.” Id. In an appeal of a trial court’s denying such motion, the record must establish both that the co-defendant would have testified and that the testimony would have been exculpatory. See id.

In the instant case, counsel’s affidavit attested that counsel had spoken with Morse and determined that the co-defendant would testify favorably for the defendant but for the possibility that he might invoke his Fifth Amendment rights. “It is not an abuse the trial court’s discretion to refuse to sever when the defendant claims that a co-defendant would have given exculpatory evidence at a separate trial but the co-defendant invoked the fifth amendment at a joint trial.” State v. Ash, 729 S.W.2d 275, 279 (Tenn. Crim. App. 1986). We do not find a clear abuse of discretion in this matter or clear prejudice enuring to the defendant. Granting the defendant’s motion to sever did not become a “judicial duty.”

Motion for Continuance

The defendant asserts that the trial court erroneously denied his motion for a continuance based on unavailability of a witness. The disposition of a motion for continuance rests within the sound discretion of the trial court, see State v. Seals, 735 S.W.2d 849, 853 (Tenn. Crim. App. 1987), and this Court will not overturn the trial court’s determination unless “it appears on the face of the record that (a) the trial court has abused its discretion and (b) prejudice enured to the accused as a direct result of the trial court’s ruling.” State v. Covington, 845 S.W.2d 784, 787 (Tenn. Crim. App. 1992). The defendant must provide a “clear showing of an abuse of discretion, to the prejudice of the defendant.” Woods v. State, 552 S.W.2d 782, 784 (Tenn. Crim. App. 1977).

When an accused requests a continuance on grounds of a missing witness, the accused must provide an affidavit establishing the following:

- (a) [T]he substance of the facts the defendant expects to prove through the unavailable witness;
- (b) sufficient facts to establish the relevance and materiality of the testimony;
- (c) the admissibility of the testimony, if the witness was available;
- (d) the non-cumulative nature of the testimony;
- (e) the witness' availability at a later date; and
- (f) due diligence in attempting to obtain the presence of the witness.

State v. Zirkle, 910 S.W.2d 874, 884 (Tenn. Crim. App. 1995).

The motion and affidavit only anticipate that the co-defendant might provide exculpatory testimony. Despite the affidavit's anticipation that the witness would benefit him, counsel admitted to the trial court on the day of the trial that he had not spoken with the witness. We do not find that the trial court arbitrarily denied this motion that was based on anticipation and conjecture.

Lack of Consent to Possess Contraband in Jail

The defendant asserts that the trial court erroneously denied his motion for a judgment of acquittal and refused his request for special jury instructions. Both assertions are based on certain statutory language regarding the pertinent offense: Absent "express written consent of the chief administrator of the institution" no person may possess certain substances or articles in that penal institution. Tenn. Code Ann. § 39-16-201. Otherwise, possession constitutes a Class C felony. See id.

The defendant's first assertion regarding this issue essentially challenges the sufficiency of the evidence, see State v. Jimmy Bowen, No. 03C01-9612-CR-00460 (Tenn. Crim. App. filed Dec. 23, 1997, at Knoxville), because the state presented the testimony of Captain George Robinson, administrator of the Williamson County jail, for proof of the lack of written consent. This proof is insufficient, the defendant argues, because only the Sheriff is the "chief administrator" of the jail.

We disagree. First, prior panels of this Court have upheld convictions under this statute, absent testimony from any administrative personnel within a given jail system, as long as a “jury had a rational basis for its conclusion [of lack of consent] even though the state did not establish by positive proof that consent had not been provided by the chief administrator of the institution.” State v. Jimmy Cullop, Jr., No. 03C01-9607-CR-00281 (Tenn. Crim. App. filed Mar. 18, 1997, at Knoxville). The absence of an entry of administrative consent “is direct proof that the chief administrator had not given his consent.” Id. Further, in the present case, the circumstances of the transfer and the subsequent efforts to keep the article from the investigating officer evidence the lack of consent for possession. See id.; State v. Jimmy Bowen, No. 03C01-9612-CR-00460 (Tenn. Crim. App. filed Dec. 23, 1997, at Knoxville).

We further note that a sheriff is directed to take charge of custody of prisoners and keep them personally, "or by deputies or jailer," until discharged by law. See Tenn. Code Ann. § 8-8-201 (emphasis added). A sheriff may delegate responsibility for prisoner maintenance. See Tenn. Code Ann. § 41-4-101. Although Robinson correctly stated that ultimate authority for the jail, as for all aspects of the Sheriff's Department, rests on the Sheriff, Robinson's testimony established that he administrated the jail. We conclude that Robinson qualified as a “chief administrator” and thus could testify that the defendant lacked permission to possess an illegal controlled substance.

The defendant further asserts that the jury instructions were erroneous because the trial court denied the defendant's request to issue a definition of “chief administrator” under the statute. The defendant concedes that the term chief administrator is not defined by the statute in question. The issued instructions tracked the language of Tennessee Pattern Instruction 23.01, fully and fairly stating applicable law. In their entirety, these instructions fairly

submitted the legal issues to the jury, and the trial court did not err by declining the defendant's special request. See State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994); State v. Rogers, 703 S.W.2d 166, 170 (Tenn. Crim. App. 1985).

We do not find that the phrase "chief administrator" of a jail has a "technical meaning" beyond the capabilities of the jurors to conclude who is responsible for the day-to-day maintenance of the jail absent a special instruction. See State v. McAfee, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). The jury heard Robinson's testimony and determined that it satisfied the statutory requirements.

CONCLUSION

We AFFIRM the trial court's judgment.

JOHN EVERETT WILLIAMS, Judge

CONCUR:

DAVID G. HAYES, Judge

JAMES CURWOOD WITT, JR., Judge